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### Res Adjudicata--Privity of Parties--Identity of Cause of Action (Wolf v. Kenyon, 242 App. Div. 116 (3d Dept. 1934))

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partment seems more forceful and may well find approval in the Court of Appeals, which in a recent decision,<sup>8</sup> evidences a recognition of the validity of the tenant's rights.

A. R. L.

RES ADJUDICATA—PRIVITY OF PARTIES—IDENTITY OF CAUSE OF ACTION.—Plaintiff alleges that he suffered damages as a result of a collision between an automobile operated by him and one operated and controlled by the defendant who, at the time of the accident, was an employee acting in the course of his employer's business and with his consent. In a prior action by the same plaintiff against the employer, a jury rendered a verdict for the latter. On appeal from an order of the Supreme Court granting the defendant's motion to dismiss the complaint, pursuant to rule 107, Rules of Civil Practice, *held*, where a suit against the master, based on the negligence of the servant, was finally determined adversely to the plaintiff such adjudication is a bar to a similar suit against the servant. *Wolf v. Kenyon*, 242 App. Div. 116, 273 N. Y. Supp. 170 (3d Dept. 1934).

Under the doctrine of *res adjudicata*, an existing final judgment rendered upon the merits by a court of competent jurisdiction is conclusive of the rights of the parties, or their privies, in all other actions upon the issues adjudicated in the first suit.<sup>1</sup> The general rule is that an estoppel of judgment must be mutual.<sup>2</sup> When dealing with estoppel of judgment, privity denotes a mutual or successive

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at 561, "The court, moreover, may well take judicial notice that receiverships of this nature now continue for a longer period than was formerly the custom. Conditions are unfavorable for an advantageous sale. It is generally to the interest, not only of the owner of the equity but also of the mortgagee and others concerned to delay a sale and to endeavor otherwise to work a solution. Disinclination to resort to a sale is further increased by recent legislation respecting the entry of judgment for a deficiency. (Chapter 794, Laws of 1933 [Ex. Sess.]; §§1083a and 1083b, CIVIL PRACTICE ACT.)"

<sup>8</sup> *Prudence Co. v. 160 West Seventy-third Street Corp.*, 260 N. Y. 205, 211, 183 N. E. 365, 366 (1932). Lehman, J., writing the opinion, states: " \* \* \* Though during the pendency of the action, a court of equity has power to issue interlocutory orders for the protection of an asserted lien, such orders must be auxiliary to the right to foreclose the lien and *cannot deprive any party of a title or a right which though subordinate to the lien of the mortgage survive and are valid until the lien is foreclosed by a sale under a judgment of foreclosure.*" (Italics author's.)

<sup>1</sup> *Fish v. Vanderlip*, 218 N. Y. 29, 112 N. E. 425 (1916); see *People ex rel. Norwich Pharmacal Co. v. Porter et al.*, 132 Misc. 609, 610, 230 N. Y. Supp. 364, 365 (1928).

<sup>2</sup> *Booth v. Powers*, 56 N. Y. 22 (1874); *St. John's v. Fowler*, 229 N. Y. 270, 128 N. E. 199 (1920); see *Kohly v. Fernandez*, 133 App. Div. 723, 727, 118 N. Y. Supp. 163, 166 (1st Dept. 1909).

relationship to the same right of property.<sup>3</sup> In other words, before the doctrine of *res adjudicata* can be applied beyond the immediate parties to the previous adjudication, the third party must either be privy to, have a right to control the conduct of the litigation,<sup>4</sup> be vouched in, or take some open and notoriously active part in the actual conduct of the litigation.<sup>5</sup> In the case of a master and servant relationship even though there is no privity here as defined above, yet we have an exception to the rule that estoppel of judgment must be mutual. This exception is allowed because of the undisputed relationship and because the action against the master is purely derivative and dependent entirely upon the doctrine of *respondeat superior*.<sup>6</sup> The courts have recognized and enforced the unilateral character of an estoppel of an adjudication where the liability of

<sup>3</sup> See *Bigelow v. Old Dominion Copper Co.*, 225 U. S. 111, 112, 32 Sup. Ct. 641; *Williams v. Barkley*, 165 N. Y. 48, 58, 58 N. E. 765 (1900).

<sup>4</sup> *Castle v. Noyes*, 14 N. Y. 329 (1856) at 333: "An estoppel by judgment includes all parties who have a right to appeal and control the action and to appeal from the judgment although not a party to the record."

<sup>5</sup> *Harlem Bus Center v. Rothenburg*, 123 Misc. 38, 205 N. Y. Supp. 353 (1924); see *St. John's v. Fowler*, *supra* note 2.

<sup>6</sup> *Lasher v. McAdam*, 25 Misc. 685, 211 N. Y. Supp. 395 (1925) (Employer was sued for negligence of servant while driving truck. Judgment rendered for defendant on the merits was held a bar to a subsequent action against servant, the liability of the employer being purely of a derivative or secondary character, on the theory of *respondeat superior*); see *Jefson v. Int'l Ry. Co.*, 80 Misc. 247, 249, 140 N. Y. Supp. 941, 943 (1913); "If a principal is exonerated from liability for the negligent acts of his agent done for him, by reason of the contributory negligence of the injured person it would seem that the agent must also be released from liability for the same act"; *Chicago etc. Co. v. Hutchins*, 34 Ill. 108 (1863); cf. *Fedden v. Brooklyn Eastern District Terminal*, 204 App. Div. 741, 199 N. Y. Supp. 9 (2d Dept. 1923) (Master's liability for the tort of his servant depends upon the doctrine of *respondeat superior*, and the servant, being primarily liable, is bound by the result of the action against the master if he had notice of the pendency of the action). But cf. *Haverhill v. Int'l Ry. Co.*, 217 App. Div. 521, 217 N. Y. Supp. 522 (4th Dept. 1926), *aff'd*, 244 N. Y. 582, 155 N. E. 905 (1927) (A judgment against the defendant in favor of a motor truck driver injured in a collision with the street car was held not conclusive and inadmissible in evidence in an action against the same defendant by the driver's employer for damages to the truck, the court holding that the estoppel claimed to arise out of the judgment in the prior action was not mutual and that there was no privity and no identity of subject matter); see, also, *St. John's v. Fowler*, *supra* note 2, 229 N. Y. at 275, 128 N. E. at 201: " \* \* \* it is not unusual for two cases arising out of the same transaction to result in different judgments because there is lacking in the one the element of proof which exists in the other."

With reference to "identity of subject matter" mentioned above, see *Borgos v. Price et al.*, 140 Misc. 287, 250 N. Y. Supp. 457 (1931); *Fry v. Williams*, 141 Misc. 815, 254 N. Y. Supp. 43 (1931). *Contra*: *Castle v. Noyes*, 14 N. Y. 329 (1856) (A judgment of a court of competent jurisdiction is conclusive in a second suit between the same parties or their privies on the same question although the subject matter may be different). To operate as an estoppel of judgment in a subsequent action it is not necessary that there should be in the former and subsequent actions identity of cause of action as well as identity of parties and subject matter if there be identity of issues involved. *Clement v. Moore*, 135 App. Div. 723, 119 N. Y. Supp. 883 (2d Dept. 1909).

the defendant is altogether dependent upon the culpability of one exonerated in a prior suit upon the same facts by the same plaintiff.<sup>7</sup> All that is necessary to render a judgment effectual as a bar to another action is that the cause of action be substantially the same,<sup>8</sup> *i. e.*, the material issues must be the same.<sup>9</sup> The reason therefor is that the rule of *res adjudicata* does not rest wholly on the narrow grounds of technical estoppel, nor on the presumption that a former judgment was right and just, but rather on the ground that public policy requires a limit to litigation.<sup>10</sup> Thus, on both principle and precedent, where a plaintiff has one cause of action based on alleged issues (the negligence of the servant, the imputed negligence of the master and his own freedom from contributory negligence) he shall be bound by his election as evidenced in a prior suit.

A. S.

SALES—ACTION BY HUSBAND AGAINST VENDOR FOR BREACH OF WARRANTY MADE TO WIFE.—Plaintiff's wife bought from defendant retailer, on her own account, a quantity of crab meat. The food proved to be contaminated and she became ill from the consumption thereof. Plaintiff brought action against the retailer for loss of con-

<sup>7</sup> See *Bigelow v. Old Dominion Copper Co.*, 225 U. S. 111, 127, 32 Sup. Ct. 641 (1911); *Pangburn v. Buick Motor Co.*, 211 N. Y. 228, 105 N. E. 423 (1914) (The unusual action of the jury in holding the defendant liable and exonerating the driver caused the court to grant a new trial instead of dismissing the complaint); *cf. Featherston v. President etc.*, 71 Hun 109, 111 24 N. Y. Supp. 603, 605 (1893): "A judgment in favor of the principal or surety on a ground equally applicable to both should be accepted as conclusive against the plaintiff's right of action."

The exception is not allowed in cases involving joint tortfeasors where the liability is joint and several. *Russell v. McCall*, 141 N. Y. 437, 36 N. E. 498 (1894) (Court held each of the several wrongdoers severally liable for the full amount of the misappropriated funds); *Jefson v. Int'l Ry. Co.*, 80 Misc. 247, 140 N. Y. Supp. 941 (1913) (A judgment against the plaintiff in a prior suit was not held a bar to the action because the defendant was liable jointly and severally).

<sup>8</sup> *A. H. G. M. and M. Co. v. Andrews*, 55 N. Y. Super. Ct. 93 (1887), *aff'd*, 120 N. Y. 58, 23 N. E. 987 (1890); 34 C. J. 1500, n. 32.

<sup>9</sup> *Lorillard v. Clyde*, 48 N. Y. Super. Ct. 409 (1882), *aff'd*, 99 N. Y. 196, 1 N. E. 614 (1885); *cf. DeSollar v. Hanscome*, 158 U. S. 216, 221, 15 Sup. Ct. 816 (1894): "It is of the essence of estoppel by judgment that either it appear on the face of the record or be shown by extrinsic evidence that the precise question was raised and determined in the former suit."

<sup>10</sup> See *Eissing Chemical Co. v. People's National Bank of Brooklyn*, 205 App. Div. 89, 91, 199 N. Y. Supp. 342 (2d Dept. 1923), *aff'd*, 237 N. Y. 532, 143 N. E. 731 (1923); *Haverhill v. Int'l Ry. Co.*, 217 App. Div. 521, 523, 217 N. Y. Supp. 522 (4th Dept. 1926), *aff'd*, 244 N. Y. 582, 155 N. E. 905 (1927) wherein the court states that a sound public policy demands that successive trials of the same issues of fact shall not be allowed to a party, although he selects different parties as defendants not technically privy to the preceding judgment or the immediate controversy in which it was granted.